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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VANESSA REDGRAVE

Petitioner,

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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November 29, 1988

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VANESSA REDGRAVE,

Petitioner,

—VS.—

BOSTON SYMPHONY ORCHESTRA, INC.,

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QUESTIONS PRESENTED

1. Did the Court of Appeals abdicate its federal judicial responsibility, violate *Michigan v. Long*, 463 U.S. 1032 (1983), and otherwise err when the Court of Appeals refused to decide an unavoidable federal constitutional issue and instead held that this case had been decided for it, in respondent's favor, on grounds of state constitutional law, solely on the basis of dicta contained in the state court's answers to questions of law certified to the state court by the Court of Appeals, when those certified questions presented only issues of statutory construction, the state court answered the certified questions of statutory construction in petitioner's favor, the state court did not decide any state constitutional question, and the state court certainly did not give a plain statement of any independent state constitutional ground for decision?

2. May a federal court properly rely, in part, upon language found in a state court minority opinion, dissenting from a state court's answers to the federal court's certified questions, where the majority of the state court, in its answers to the certified questions, rejects the conclusion of the dissent?

3. Were the petitioner's rights further violated when the federal court entered judgment against petitioner in this federal case, based upon the dicta in the state court's answers to the

certified questions, without any consideration by the federal court, or by the state court, of the crucial issue of how the law as supposedly set forth in the state court's dicta applied to the facts in the trial record?

4. Did the courts below err in concluding, without any analysis, that a state civil rights statute, requiring employers not to interfere with the free speech rights of individuals, was unconstitutional, as applied to a performing arts organization's termination of a contract employee because of her political views, on the ground that the performing arts organization has a constitutional "artistic integrity" right to perform, or not to perform, as it sees fit?

PARTIES TO THE PROCEEDING

Petitioner Vanessa Redgrave was appellant in the court below. Vanessa Redgrave Enterprises Ltd. also was an appellant in the court below, but only as to the contract claim, which is not before this Court. Respondent Boston Symphony Orchestra, Inc. was the appellee-cross appellant in the court below.

RULE 28.4(C) STATEMENT

28 U.S. § 2403(b) may be applicable. No court below certified to the State Attorney General the fact that the constitutionality of a state statute was drawn in question. The Massachusetts Attorney General submitted an *amicus curiae* brief supporting Redgrave to the Massachusetts Supreme Judicial Court, but that brief addressed only the issues of statutory construction that were certified by the Court of Appeals to the Massachusetts Supreme Judicial Court.

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Petitioner Vanessa Redgrave respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on August 31, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, sitting *en banc*, and reversing the Court of Appeals' prior panel decision, is reported at 855 F.2d 888 (1st Cir. 1988), and is reprinted in the appendix hereto at pages 1a-67a. The judgment entered below is reprinted at page 68a of the appendix. The First Circuit's Order denying rehearing is reprinted at pages 70a-71a of the appendix. The opinion of the First Circuit panel, which was later reversed by the First Circuit *en banc*, is reprinted at pages 72a-108a of the appendix. The opinion of the Massachusetts Supreme Judicial Court, answering the two questions of statutory construction certified by the First Circuit panel, is reported at 399 Mass. 93, 502 N.E.2d 1375 (1987), and is reprinted at pages 109a-126a of the appendix. The opinion of the District Court is reported at 602 F.Supp. 1189 (D. Mass. 1985), and is reprinted at pages 129a-181a of the appendix.

JURISDICTION

The decision of the Court of Appeals for the First Circuit, *en banc*, was filed August 31, 1988. Petitioner duly moved for rehearing, and that motion was denied on September 20, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, which are the First Amendment, its equivalent provision in the Massachusetts Declaration of Rights, and Sections 11H and I of Chapter 12 of the Massachusetts General Laws, are reprinted at pages 127a-128a of the appendix.

STATEMENT OF THE CASE

The decision below holds in effect that a significant new state civil rights statute, designed to provide a remedy for interfer-

ence by private parties with the exercise of constitutional rights, is itself unconstitutional, at least as applied to a performing arts organization's dismissal of a contract employee because of her political views, because of the existence of a novel "artistic integrity" free speech defense to civil rights liability. That serious result—serious both in terms of its effect on the new civil rights statute and in its unprecedented extension of constitutional law—was reached below without any analysis of constitutional law and on the basis of what the court below conceded was mere dicta.

On appeal after trial, the Court of Appeals for the First Circuit certified to the Massachusetts Supreme Judicial Court ("MSJC") two questions concerning the meaning of the new Massachusetts civil rights statute upon which plaintiff-petitioner Vanessa Redgrave had sued defendant-respondent Boston Symphony Orchestra ("BSO"). The MSJC, answering the certified questions, resolved every issue concerning the meaning of that State statute in Redgrave's favor. Applying that State law to the facts of the case, a panel of the Court of Appeals for the First Circuit then held that BSO was liable to Redgrave under that statute. The First Circuit panel rejected a novel First Amendment defense of "artistic integrity."

Then, on rehearing *en banc*, a bare 3-2 majority of the *en banc* Court of Appeals seized upon tentative dicta in the MSJC's answers to the certified questions, concerning the "artistic integrity" free speech defense—an issue of constitutional law *not* certified to the MSJC. Relying on that dicta by the MSJC, finding an independent state ground where none was given, and declining to decide the constitutional issue for itself, the Court of Appeals *en banc* majority proceeded to reverse the prior panel decision and to enter judgment in favor of BSO. Thus was judgment entered below in favor of BSO, on a novel constitutional defense that no court has ever truly ruled on.

This case therefore presents for review two distinct, significant issues—one procedural and one substantive—each of which is worthy of grant of certiorari.

1. The procedural issue concerns the proper use of the device whereby federal courts may certify issues of state law for decision by state courts. This Court should caution lower courts

against using certification as it was used here—as an excuse for evading constitutional questions that cannot properly be evaded, in violation of Redgrave's rights and in violation of *Michigan v. Long*, 463 U.S. 1032 (1983).

In the harsh but accurate words of the *en banc* dissent below, the *en banc* majority sought to avoid deciding the constitutional issue presented by "manipulating" the MSJC's answers to the certified questions. (A 57a).[1] The *en banc* majority sought to justify its reliance on the State court's dicta, and its wholesale abdication of the judicial function, as follows (A 27a):

> In the absence of a definitive ruling by the highest state court, a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand,' taking into account the broad policies and trends so evinced.

But there is a vast difference between relying on state court dicta in an effort to divine the meaning of a state statute, on the one hand, and, on the other hand, relying on state court dicta to decide an issue of constitutional law. And that difference becomes essential where, as here, (a) the state court has long held that the state's constitutional law of free speech is coextensive with the First Amendment and (b) the state court's dicta contains no suggestion that the two sets of constitutional law diverge. The *en banc* dissenters rightly complained that this avoidance of decision-making was "comity run amok" and "a mockery of the certification process." (A 44a; 58a).

2. The substantive issue presented is whether there exists a so-called "artistic integrity" constitutional bar to a state legislature's attempt to establish a new remedy for what this Court has characterized as political coercion.

In a free society, people's livelihoods should not depend upon their holding "correct" political views, as defined either by their government or by their employer. This Court has recognized that where a state dismisses an employee in retaliation

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1 References to "A _____" are to the separately-bound appendix to this petition.

for that employee's political views, federal law provides a remedy for such "political coercion." *Branti v. Finkel*, 445 U.S. 507, 517 (1980).

This case concerns political coercion in the private sector—behavior that, forty years ago, was commonly known as blacklisting. Forty years ago, some of the most able people in this country lost their livelihoods because their employers decided to prove their own political "purity" by firing and refusing employment to people identified in some manner with communist, socialist or liberal politics. *See, e.g.*, K. Foley, *The Political Blacklist in the Broadcast Industry* at 422 (1979). And although many lives were ruined in the process, few victims of that political coercion sought redress in the courts, and those who did were turned away. *See* Comment, "Political Blacklisting in the Motion Picture Industry," 74 *Yale L.J.* 567, 567-69 (1965).

The State of Massachusetts in 1979 enacted a broad new civil rights statute, called the Massachusetts Civil Rights Act ("MCRA"), that provides a remedy for, among other things, such blacklisting. It was the peculiar genius of the MCRA—the state statute upon which Redgrave relies—to extend to the private sector the kind of protection for basic political rights that this Court recognized, in *Branti v. Finkel*, 445 U.S. 507 (1980), applies to state action.[2] The courts below agreed that the MCRA provides a remedy to victims of such political coercion by a private defendant even if the defendant acted in acquiescence to third-party pressure. (A 25a-26a; 114a-117a).

The substantive issue presented, therefore, is no more and no less than whether the State of Massachusetts (or any other legislative body) has the power to enact a statutory remedy against blacklisting or whether, on the other hand, there is a First Amendment bar to a statute that attempts to create such a remedy.

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2 The MCRA provides for a private right of action against "any person or persons, whether or not acting under color of law, [who] interfere by threats, intimidation or coercion," or attempts to interfere by threats, intimidation or coercion, "with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the [constitution or laws of the] commonwealth." Mass. Gen. Laws Ann. Ch. 12, § 11H (1984), *id.* § 11I.

This statement of the substantive issue is no mere rhetoric. Redgrave proved at trial that BSO terminated her employment solely because she had expressed (nowhere near BSO's stage) a political view unpopular in some circles, namely, that the Palestinian people should have a homeland of their own. As the dissenters to the First Circuit *en banc* decision below stated (A 63a):

> The only possible conclusion to be drawn from this record [*i.e.*, the trial record] and from the findings of the district court is that the BSO cancelled its contract with Redgrave in acquiescence to pressure from persons who disagreed with her political views and who, therefore, sought to retaliate against her . . . . The BSO, by doing so, effectively has blacklisted Redgrave.

Yet the First Circuit, sitting *en banc* and voting 3-2, has now held, albeit by default and indirection, by deferring to the MSJC's dicta on this subject, that there is a constitutional exception to this new and significant statutory liability—a defense of "artistic integrity." According to the "decision" below, a performing arts organization is constitutionally immune from such liability, evidently on the theory that a performing arts organization may perform, or not, as it sees fit, and need not conform even to such a speech content-neutral, and societally important, regulation as the MCRA.

That "holding" should be reviewed by this Court because it constitutes an unprecedented expansion of the First Amendment that has undermined a significant new piece of State civil rights legislation that itself was designed to protect First Amendment rights. As the *en banc* dissenters pointed out (A 66a), the result reached below is "nightmarish."

Statement of Facts

In March 1982, BSO hired Redgrave, a renowned actress, to perform as the narrator of BSO's production of Stravinsky's opera-oratorio "Oedipus Rex." (2035a-2039a).[3] On Monday, March 29, promptly after the news media reported Redgrave's

3 References to (_____ a) are to the Joint Appendix in the court below.

engagement, Irving Rabb, a BSO Trustee, called BSO General Manager Thomas Morris and asked whether BSO had in fact hired Redgrave, and if so, if BSO could "get out of it." (377a-378a; 381a; 383a). In Rabb's view, Redgrave was "very anti-Israel" and "a supporter of the PLO." (379a; 383a).

Morris confirmed to Rabb that BSO had hired Redgrave. (384a). Rabb told Morris that "there's a great deal of anger about this in the Jewish community." (428a). The Boston B'nai B'rith Anti-Defamation League was to meet in the next few days to decide whether publicly to censure BSO for hiring Redgrave. (182a). Rabb and Morris then had the following exchange (384a):

> I [Rabb] said, 'Is there any way you can get out of this contract? I think you will offend a tremendous number of Jews in the community if she performs.'

Morris replied: "Give me an hour or two, let me get some more information, and I will call you back." (384a).

Immediately after speaking with Rabb, Morris called a meeting of his staff and reported that Rabb was trying to stem opposition and prevent Jewish organizations from issuing a statement critical of BSO. (183a). Morris described the problem as one of fund raising and public relations. (185a-186a; 688a). Morris suggested getting a substitute for Redgrave as narrator. (186a).

After the meeting, Morris called Rabb. In the interim, Rabb had called the Anti-Defamation League and left word that Rabb "had called the [BSO] management and was trying to see if they could cancel the contract," and that no statement critical of BSO should be issued. (387a). Rabb and Morris agreed that Redgrave's contract should be cancelled, and Morris told Rabb that Morris was working on it. (388a-390a; 394a). Morris remarked that the worst thing that could happen would be for public statements to be made censuring BSO. (598a-599a).

Morris then turned to the task of going forward with the "Oedipus Rex" concerts without Redgrave and masking the reason for dumping her. At a meeting Monday afternoon, Morris asked BSO stage director Peter Sellars if Sellars would stage

the performances without Redgrave as narrator. (187a).[4] Sellars replied that he would like to think it over. (189a-190a). Morris also discussed changing narrators with the president of the BSO Trustees (483a-485a), and with BSO Press Office staff at a dinner meeting. (601a).

When Sellars returned to Symphony Hall later Monday night, Morris told Sellars that "Oedipus Rex" could not proceed with Redgrave as narrator. (204a). Sellars then told Morris his own thinking (192a-194a; 200a):

> I explained . . . that . . . the act of removing Ms. Redgrave from the performances . . . was fully the equivalent of in 1933, because of a certain political climate, saying at the Vienna State Opera, let's not have a Jewish person sing the role of Siegfried. It was a form of blacklisting. It was denying the right to work of a given artist because of their political points of view. . . . I said that I felt it [would] se[t] an extremely dangerous, dangerous precedent. . . . If artistic decisions began to be made not because of artistic qualifications but because of political qualifications, then we are into a situation that could be accurately described as blacklisting.

Morris replied it was Morris's decision to make and that, in his view, it was impossible to proceed with Redgrave. (198a; 203a-204a; 333a).

On Tuesday, March 30, Morris ordered Redgrave's name deleted from the advertising for the concerts. (211a; 607a). Morris again told Sellars that "Oedipus Rex" could not proceed with Redgrave. (214a). That same day, Morris and BSO Press Office personnel began drafting a press release announcing that Redgrave would not appear in the "Oedipus Rex" performances. (268a-269a).[5]

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4 BSO had hired Peter Sellars, an eminent director, MacArthur Prize winner, and later the artistic director of the American National Theatre of the Kennedy Center for the Performing Arts in Washington, D.C., to serve as Stage Director of the "Oedipus Rex" performances. (150a; 159a-160a).

5 Also on Tuesday, March 30 Morris began to suggest that if the concerts were to proceed with Redgrave, various things could happen, ranging

Late Tuesday afternoon, Morris reported, in a written memorandum to the Chairman of the BSO Trustees, that BSO had received no threats, except for possible picketing that BSO admitted would not have disturbed the performances. (608a; 2032a; 1564a). Morris also reported: "The sentiments of the Jewish [sic] are without question stronger than we had anticipated." (2032a).

On Wednesday, March 31, Sellars refused to go forward without Redgrave, and Morris decided to cancel the "Oedipus Rex" program. (239a-242a).

On Thursday, April 1, BSO issued a press release that tracked the *force majeur* clause in Redgrave's contract and stated that the cancellation was "due to causes and circumstances beyond [BSO's] reasonable control." (252a; 2042a). Although BSO argued to the jury that BSO's conduct was excusable,[6] the jury

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from picketing to audience disruption. (218a). Morris began to "search for the public safety problems that would impede the performance [if Redgrave appeared]." (*Id.*). Morris' attempt to invent an excuse included communications with an official at Carnegie Hall, and with the Boston Police Department, in which he asked for a guarantee that there would be no disruption (611a-615a)—a guarantee that no one could give for any live performance, as Morris admitted at trial. (621a). Morris told the Police Commissioner that Morris "was getting some pressure from the Jewish community not to allow her to go on." (1745a-1746a). Morris and the Police Commissioner discussed Morris's "fantasies" of what might happen. (1735a). The Police Commissioner said he "would give him everything we had that would insure public safety" (1751a), that he could assure public safety (1755a), but that he could not "guarantee" that there would be no disruption. (1755a). Morris also fed disinformation to BSO Musical Director Seiji Ozawa. Without any basis for saying so (610a), Morris told Ozawa that Redgrave might talk back to the audience from the stage. (529a). Morris also told him that people had threatened to boo Redgrave (548a)—when no such threat was ever made or received, and Redgrave had never once been booed during any artistic performance. (721a).

6 BSO argued that the performance would have been disrupted, but no threats to disrupt the performance were ever made. Before cancelling, BSO received nothing more than four mild protest letters (2045a-2050a) and some telephone calls in which subscribers expressed their disagreement with BSO's decision to hire Redgrave and, at most, threatened to withhold contributions or picket the performance. (1383a-1380a; 1709a-1711a). One member of BSO's Press Office told the unlikely story that a Mr. Arthur Bernstein had called BSO, identified himself as a leader of the Jewish Defense League, gave his telephone number, and threatened that there would be violence if the con-

found otherwise, returning a verdict in Redgrave's favor on the contract claim, which is not before this Court.

The Proceedings Below

Redgrave sued BSO in federal court, relying on diversity jurisdiction, for breach of contract and for violation of the MCRA.

At trial, the parties differed on the meaning of the MCRA. BSO contended that BSO could be liable under MCRA only if BSO fired Redgrave because BSO itself objected to her politics. Redgrave contended that BSO could be liable if BSO terminated her in acquiescence to political opposition by BSO's clientele.

The United States District Court for the District of Massachusetts instructed the jury (which, with regard to this civil rights claim, was sitting only in an advisory capacity) that BSO could be held liable under MCRA only if BSO fired Redgrave because BSO itself disagreed with her political views.

The jury returned a verdict for BSO on the MCRA claim. But, ten days later, the entire jury spontaneously wrote to the trial judge:

> We [*i.e.*, the jurors] were convinced that there was indeed an abrogation of Redgrave's civil rights by the BSO. We were convinced that one of the primary reasons that the BSO cancelled the arrangements for Vanessa Redgrave to appear as narrator in the performances of Oedipus Rex, was that the agent(s) who acted for the BSO in making the decision to cancel were willing to cooperate

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certs went ahead with Miss Redgrave. (1664a-1665a; 1600a). This account—that someone would call, give his name and number and threaten violence—is on its face hard to credit. Bernstein himself testified that all he did when he called BSO was to inform BSO that he would picket. (1325a-1326a; 1331a-1333a). In any event, Bernstein's call came days after BSO decided (in Morris' words) to "throw [Redgrave] overboard" (188a)—and came even after the cancellation was publicly announced. (1387a-1388a; 1639a-1643a). Morris admitted he knew nothing of the call until after the cancellation was announced. (648a). Clearly, the Bernstein call was a red herring. Also, not one of BSO's musicians refused to play, and a member of BSO's management admitted that the musicians had nothing to do with the cancellation. (1759a-1766a).

> with members of the broader Symphony community (*i.e.* season subscribers, ticket holders, and supporters of monetary contributions) in the desire by members of that broader community to fire Ms. Redgrave because, and only because, of the disagreement of that group with political views that Redgrave had publicly expressed.
>
> The group expressed its demands in terms of politics and money—disagreement with Redgrave's politics and threats, expressed or implied, to withhold money. The BSO agent(s) knew this to be so. They knew further, that to accede, to these demands was to violate Ms. Redgrave's civil rights . . . We thought [this] was clearly proved by a preponderance of the evidence [but] we could find no way to express [it] within the confines of the verdict questions and your [*i.e.*, the court's] explanation to us as to the parameters within which the law required we must decide. (2129a).

In its findings of fact, the trial court found that BSO did not terminate Redgrave because BSO itself opposed her politics. (A 181a-182a). Given the trial court's narrow reading of the MCRA, that narrow finding was sufficient to dispose of the case, so the trial court made no other finding about the reasons for the termination.[7]

On appeal, after oral argument, the First Circuit panel certified to the MSJC two novel questions of statutory interpretation upon which the First Circuit wanted guidance. The two certified questions were as follows:

> 1. Under the Massachusetts Civil Right Act, Mass. Gen. Laws Ann. Ch. 12, § 11H and § 11I, may a defendant be held liable for interfering with the rights of another person, by, 'threats, intimidation, or coercion,' if the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights?

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7 The trial court made *no* finding as to whether or not BSO terminated Redgrave in acquiescence to Redgrave's political opponents. Instead, the trial court wrote (emphasis added): "*Even if it in fact occurred*, such acquiescence [does not violate the statute]." (A 184a). The trial court therefore did not rule out such acquiescence.

2. If a defendant can be held liable under the Massachusetts Civil Rights Act for acquiescence to third party pressure, is it a defense for the defendant to show that its actions were independently motivated by additional concerns, such as the threat of extensive economic loss, physical safety, or particular concerns affecting the defendant's course of business?

In January 1987, the MSJC answered both certified questions in Redgrave's favor. The MSJC answered the first certified question in the affirmative, and the MSJC answered the second certified question in the negative. (A 25a-26a; A 113a-117a).

In so holding, the MSJC issued three separate opinions. A plurality opinion joined by three of the MSJC's seven judges (A 109a-117a), and a concurring opinion joined by two more MSJC judges (A 117a-118a), answered the statutory questions in Redgrave's favor. A dissent, representing the views of the two remaining MSJC judges, would have resolved the statutory questions in BSO's favor. (A 118a-126a).

The three MSJC opinions contained dicta concerning an issue of constitutional law *not* certified to the MSJC. The plurality opinion contained dicta that plainly was meant to raise issues for subsequent consideration by the Court of Appeals.[8] As the

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8 The MSJC plurality wrote (A 112a-113a emphasis added): "We answer the two certified questions in accordance with their clear and unequivocal wording. *In doing so, we express no opinion on some serious issues which are not addressed in the questions but which are suggested by the record of the case. It can be inferred* from the record that the BSO was itself a victim of violations of G.L.c. 12, § 11H, by those persons who put pressure on the BSO to cancel the Redgrave participation. *From the premise* that the BSO had the free speech right to perform or not as it saw fit, *it can be argued* that the BSO's secured rights were interfered with, and that it was not within the legislative intent that anyone should be punished under c. 12 for exercising the constitutional right not to speak (i.e., perform). *It can also be argued* that when a private person decides not to speak and has no duty to do so, it would be unconstitutional to require that person to speak or, contractual obligations aside, to punish him civilly for not speaking. . . . *We have not considered any of the above arguments or issues in answering the two certified questions.* We treat the questions as addressed to a typical action under the Massachusetts Civil Rights Act, which does not concern a defendant who is exercising a free speech or other constitutional right in interfering with the secured rights of another. *In short, we answer the two questions as they are worded.*"

en banc dissenters below pointed out (A 50a; emphasis in original):

> These comments [in the MSJC plurality opinion concerning the constitutional issue] are pure hypothetical conjecture and equivocation. They do not even rise to the level of dicta because they are not statements of *opinion* regarding issues not before the court. They are merely recitations of arguments that might be made (concerning issues not before the court), without any indication whether the justices in the plurality indeed thought that the arguments were valid.

The plurality opinion made no reference to Massachusetts constitutional law.

The dissenting two MSJC judges briefly referred to constitutional law: To buttress the dissent's construction of the MCRA—that there could be no liability unless BSO terminated Redgrave because BSO itself was opposed to her political views—the two dissenting judges invoked the rule that statutes be construed "to avoid . . . constitutional difficulties . . ." (A 122a).

These comments cannot properly be read to recognize a constitutional defense. In the trenchant words of the *en banc* dissent below: "When the [MSJC] dissent said it [would] construe the MCRA to avoid constitutional questions, it was doing precisely that: *avoiding* the constitutional question, not deciding it." (A 51a; emphasis in original). The MSJC dissenting opinion also contained no reference to Massachusetts constitutional law.

In the concurring opinion, the MSJC's two remaining judges stated their agreement with the plurality's answers to the certified questions of statutory construction. The two concurring judges then went on to speculate that "perhaps the Court of Appeals intended to insulate us from consideration of constitutional issues." (A 117a-118a). The two concurring judges continued their speculations as follows, *id.*:

> I have been unable to think of any theory under which, in the circumstances, statutory liability may properly be imposed on the BSO in the face of its State constitutional

> right to determine what artistic performances it will or will not perform. Redgrave's constitutional rights are no greater than those of the BSO, and there was no way in which the interests of each could be accommodated.

These comments, on an issue not before the MSJC, could not properly be relied upon as stating an independent state ground for deciding this case *even if* the comments had been adopted by a majority of the MSJC (which they were not). As the *en banc* dissent pointed out: "In invoking the Massachusetts Declaration of Rights, the concurring justices expressed no intent to depart from the established rule that state free speech rights are identical to and based on federal rights. Their opinion, therefore, does not provide 'independent grounds,' as required by *Long*." (A 56a).[9]

The First Circuit panel issued its decision on October 14, 1987, splitting 2-1. The majority, consisting of Circuit Judges Bownes and Selya, held that, given the MSJC's answers to the certified questions, BSO was liable under the MCRA. (A 94a-97a). The panel majority rejected as a matter of law BSO's argument that BSO had a First Amendment "artistic integrity" defense to liability under MCRA. (A 97a-101a). The panel remanded for the limited purpose of damage assessment. (A 100a-101a).

Judge Coffin dissented, on the ground that, in his view, BSO had a First Amendment defense. (A 101a; 104a). Significantly, Judge Coffin did *not* contend in his panel dissent that the

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9 As BSO itself acknowledged in its briefs to the Court of Appeals, the MSJC has repeatedly held that the right of free speech under the Massachusetts Declaration of Rights is co-extensive with free speech rights under the First Amendment. *Langone v. Secretary of the Commonwealth*, 388 Mass. 185, 446 N.E.2d 43, 50 (1983) ("Plaintiffs. . . advance no separate reasons, and we are unaware of any, to conclude that the Massachusetts Constitution affords them protection not provided by the First and Fourteenth Amendments of the United States Constitution"); *Opinions of the Justices to the House of Representatives*, 387 Mass. 1201, 1202, 440 N.E.2d 1159, 1160 (1983); *Colo v. Treasurer and Receiver General*, 378 Mass. 550, 558, 392 N.E.2d 1195, 1200 (1979); *First National Bank of Boston v. Attorney General*, 371 Mass. 773, 359 N.E.2d 1262 (1977).

MSJC had already answered the constitutional issue on State constitutional grounds.[10]

Months later, however, after the First Circuit agreed to hear the case *en banc*, Judge Coffin did an about-face. Writing now for a bare *en banc* majority of three, Judge Coffin turned the MSJC's speculative dicta into a holding on constitutional law. And although a few months before Judge Coffin saw no alternative to reaching the First Amendment issue, now he wrote for the *en banc* majority: "We decline to reach the federal constitutional issues . . . ." because now he found that the MSJC had decided the case in favor of BSO on independent State grounds. (A 43a). On that rationale, and *without deciding for itself any issue of law bearing on the MCRA claim*, but instead deferring to what the *en banc* majority conceded to be mere dicta (A 27a), the *en banc* majority entered judgment against Redgrave. (A 43a).

Judge Bownes and Selya's *en banc* dissent was harshly critical of the *en banc* majority opinion (A 44a):

> The majority's reading of the SJC's opinions is ill-founded and wholly unconvincing. It ignores the clear and unequivocal answers to the two questions certified to the SJC, relying instead on dicta in the SJC plurality opinion, it unduly emphasizes the concurring opinion by two justices, and it engrafts onto the plurality and concurring opinions selected statements from the dissent. Then, to hold this pastiche together, it overrules . . . well-established Massachusetts law holding that, as far as freedom of speech is concerned, state and federal rights are coextensive. Not only has the majority ignored the dictates of *Michigan v. Long*, 463 U.S. 1032 (1983), it has rewritten Massachusetts law. This is comity run amok.

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10 BSO itself conceded that the MSJC had not decided the constitutional issue. Thus, in support of its application to the First Circuit panel for permission to submit additional briefs to the First Circuit panel, BSO stated (emphasis added):

> In its response to this Court's certification of questions in this appeal, the Supreme Judicial Court *raised and left open* a number of issues of constitutional dimension now before this Court in the pending appeal.

The *en banc* dissent pointed out that a majority of the MSJC, in its answers to the certified questions, rejected the statutory defenses offered by BSO; that the MSJC had expressly declined to decide any issue of constitutional law; that there was no statement of an independent state ground sufficient to satisfy this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983); that the State's interest in the MCRA was weighty;[11] that the BSO's claimed constitutional defense was vague, unprecedented and unlimited;[12] that BSO had, of its own free choice, decided to perform "Oedipus Rex" and to engage Redgrave to perform in it; and that, under this Court's prior decisions, including *Board of Directors of Rotary Int'l v. Rotary Club*, 107 S.Ct. 1940 (1987), any incidental effect on BSO's interests was insufficient to render the MRCA unconstitutional. (A 44a-66a).

The dissenters also pointed out "the potentially nightmarish consequences of recognizing" the constitutional right that BSO contended for. (A 66a). Here, as elsewhere, the *en banc* dissent was eloquent (A 66a-67a):

> If the first amendment extends absolute protection to the BSO when it fired Redgrave in response to public outcry over her political views, why would it not also protect the BSO in caving in to public views about her sex, her race, or her religion? If, in another case, the BSO refused to hire a Black performer because it felt that protests by bigots would be so intense as to compromise the BSO's 'artistic integrity,' then the Black performer should have a cause of action under the MCRA against the BSO for infringing her rights under the equal protection clause and any analogous state constitutional provisions banning race discrimination. But the 'artistic integrity' defense would impose a

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11 The dissenters below wrote: "The effect of the MCRA in this case is to further the Commonwealth's interest in preventing the abridgement of speech. There can be no denying that this interest is substantial. Political speech, like the pro-PLO speech for which Redgrave has been made to suffer, is a particularly valuable and protected commodity." (A 59a).

12 The dissenters below wrote: "Under the rubric of 'artistic integrity,' the BSO [w]ould insulate itself from any but the most superficial legal scrutiny." (A 64a).

fatal barrier to the application of the MCRA. And there is no reason to assume that the same defense would not also extend to other institutions, such as newspapers and universities, that engage generally in first amendment activity.

REASONS FOR GRANTING THE WRIT

I

THE CERTIFICATION PROCESS MUST NOT UNDERMINE BASIC PRINCIPLES OF FEDERALISM, INCLUDING THE FEDERAL COURTS' DUTY TO DECIDE CONSTITUTIONAL ISSUES THAT PROPERLY MAY NOT BE AVOIDED

If properly applied, certification can be "a promising tool for obviating some of the great difficulties which result when a federal court attempts to interpret a state statute which has never been interpreted by the highest court of the state."[13] In this case, however, the State court answered the certified questions and resolved all the issues of statutory construction in favor of Redgrave. All that remained was the constitutional defense proffered by BSO. Given the co-extensiveness of pertinent federal and State constitutional law, the Court of Appeals erred profoundly when it ignored the dictates of *Michigan v. Long* and failed to decide the constitutional issue presented.

This error in the use of the certification process, together with the other errors discussed below, is worthy of this Court's attention. Today, at least 36 states have enacted certification statutes or rules.[14]

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13 Remarks by Chief Justice Rehnquist at the January 27, 1988 Meeting of the National Conference of Chief Justices, Williamsburg, Va., at 15, as quoted in "Inter-Jurisdictional Certification And Choice of Law," 41 *Vanderbilt Law Review*, 411 at 413, note 1 (April 1988). *See Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974); *Bellotti* v. *Baird*, 428 U.S. 132 (1976).

14 Committee on Federal Courts, "Analysis of State Laws Providing for Certification By Federal Courts of Determinative Issues of State Law," 42 *Rec. A.B. City N.Y.* 101, 126-153 (1987).

A. Deciding a Federal Case on Constitutional Grounds on the Basis of State Court Dicta Containing No Independent State Ground

The *en banc* dissent was highly critical of the decision below for "flout[ing] the compelling logic and binding precedent of *Long*." (A 56a). *Long* requires a plain statement of an independent state ground for decision.

Because there was nothing at all in the MSJC's decision that could support a finding of an independent State ground for decision of the constitutional issue, the *en banc* majority went *outside* the four corners of the MSJC's answers in search of a distinction between the Massachusetts constitutional law of free speech and the First Amendment. To support the proposition that such a distinction exists, the *en banc* majority cited a law review article by one of the MSJC justices and three prior MSJC cases, none of which was cited in the MSJC's answers to the certified questions. (A 41a).

Even if it were proper to employ such extra-decisional sources for this purpose, the *en banc* majority's analysis does not bear scrutiny. The few authorities cited by the *en banc* majority are not on point. Of the three cases cited by the *en banc* majority, one, *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985), concerns search and seizure rights and has nothing to do with freedom of speech. The other two, *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978), and *Cabaret Enterprises Inc. v. Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 468 N.E.2d 612 (1984), concern nude dancing in places where alcohol is served, and both those cases distinguished State law from federal law on the ground that Massachusetts does not have a constitutional provision analogous to the Twenty-First Amendment, and not because there is some distinction between Massachusetts and federal free speech rights. The law review article, meanwhile, actually shows that there is *no* distinction between constitutional protection of free speech under Massachusetts constitutional law, on the one hand, and under the First Amendment, on the other hand.[15]

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15 With regard to the law review article written by one of the MSJC justices, the *en banc* dissent wrote as follows (A 53a-54a):

> Justice Wilkins' article discusses generally the relationship between the United States Constitution and the Massachusetts Declaration of

Turning to *Michigan v. Long* itself, the *en banc* majority emphasized that the MSJC's answers to the certified questions cited no federal cases on the constitutional issue and that there was "no appearance" that the MSJC was referring to federal law on this issue. (A 42a). Ignoring the fact that the three MSJC opinions also cited no State cases on the free speech issue presented, spoke vaguely of "constitutional law," and (except for the concurrence) did not even mention the State Constitution, the *en banc* majority wrote (A 42a):

> We think it clear, that the concurrence did rely on 'adequate and independent state grounds,' and we are confident that at least a majority of the SJC would join that position.

The *en banc* dissent pointed out that this Court held in *Long* that there can be no independent state ground if a state court opinion is ambiguous as to the source of its constitutional ruling. (A 55a).[16] The *en banc* majority erred by ignoring

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Rights and, among other things, it explores "the *future prospects* for construing [the Massachusetts free speech guarantees] as divergent from the First Amendment." *Supra* at 58 (emphasis added). . . . The principle that Massachusetts and federal speech rights are coextensive is a firmly established one, noted in many opinions of the SJC. *See, e.g.*, cases cited *supra* at 75. It has never seriously been questioned in any SJC opinion. This principle leads to the inescapable presumption that whenever the SJC rules on the state constitutional right to free speech, it is also ruling on the first amendment. The extrajudicial commentary of a single justice does not alter this presumption. If anything, Justice Wilkins' law review article demonstrates a familiarity with past SJC practice such that if he had wanted to depart from the established rule, he would have done so explicitly.

16 Thus, this Court stated in *Long*, 463 U.S. at 1040-42 (emphases added): "When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is *not clear from the face of the opinion*, we will accept as the most reasonable explanation that the state court decided the way it did because it believed that federal law required it to do so . . . . *If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds*, we, of course, will not undertake to review the decision . . . . [A]mbiguous or obscure adjudications by state courts [must] not stand as

the "presumption" that this Court established in *Long*, 463 U.S. at 1043, n.8: There is no independent state ground unless a state court opinion plainly states one.

The *en banc* dissent then applied the rule of *Michigan v. Long* to what little the MSJC actually did say about the constitutional issue in its answers to the certified questions (A 55a-56a):

> [N]either the SJC plurality opinion nor the dissent can fairly be read to have decided or opined on any constitutional issue. However, even assuming that all three opinions suggested a constitutional ruling, *none* satisfies the *Long* plain statement test and *none*, therefore, justifies the majority's evasion of the federal constitutional issues raised. With respect to the plurality and the dissent, this court's majority opinion itself notes that neither "distinguished between possible state and federal sources." *Supra* at 57. To the extent those opinions have any constitutional dimension, they are precisely the kind of "opaque" state court rulings that Long was intended to address. *See supra* at 60.
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> The majority attempts to over-come this facial violation of the plain statement rule through its "confidence" that

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barriers to a determination by this Court of the validity under the federal constitution of state action . . . . [We will] assume that there are no such grounds when it is *not clear from the opinion itself* that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Accord Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986) ("The opinion of the Delaware Supreme Court . . . lacks the requisite, plain statement, that it rests on state grounds"); *New York v. P.J. Video, Inc.*, 475 U.S. 868, 873 n.4 (1986) ("We conclude, in the absence of a 'plain statement' to the contrary, that the decision of the Court of Appeals was premised on federal, not state law"); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) ("An examination of the decision below reveals that it contains no clear or express indication that a separate, adequate and, independent state-law grounds were the basis for the court's judgment"); *Ohio v. Johnson*, 467 U.S. 493, 498 n.7 (1984) ("A review of the court's syllabus indicates that the court did not articulate an independent state-law ground for the decision"); *Florida v. Meyers*, 466 U.S. 380, 382 n. (1984) ("This is hardly a clear indication that the [state court's] ruling provided an independent and adequate basis for reversal of the conviction").

> the plurality and dissenting justices "would" decide this case on state constitutional grounds if that issue were presented to them. *Supra* at 60. Speculation about what the SJC "would" decide does not, however, a plain statement make, and without a plain statement that the justices intended to rely independently on the Massachusetts Constitution, we *must*, under *Long*, assume that the justices were relying on the federal Constitution.
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> The opinion of the two concurring justices [,meanwhile,] expressed no intent to depart from the established rule that state free speech rights are identical to and based on federal rights. Their opinion, therefore, does not provide "independent grounds" as required by *Long*.
>
> Overall, the majority has read between the lines of the SJC's three opinions, ferreted out a constitutional ruling where none was intended, and then blindly deferred to that ruling in the complete absence of any plain statement of adequate and independent state grounds.

The rule of *Michigan v. Long*, violated below, in fact deserved particular respect in this case. That rule has even greater significance in this case than it had in *Michigan v. Long* itself, for three reasons:

1. The *Michigan v. Long* rule arose in a case brought in a state court, where the state court based its ruling on a constitutional ground. That rule, requiring a plain statement of an independent state ground, grows in importance when applied to a federal court's use of a state court's answers to questions certified by the federal court. For federal courts should not be asking the state courts to do what that the federal courts themselves are obligated to do—namely, to decide questions of federal law.

Federal courts should decide issues of federal law not only because federal courts have greater experience with and knowledge of federal law. Federal courts should also be deciding issues of federal law because parties, including the petitioner in this case, have a right to be in federal court and to have their cases decided by federal judges who are appointed for life and are shielded from political forces. These considerations are particularly strong in the case at bar, in which a foreign plaintiff,

relying on the federal diversity statute, comes to federal court to sue a major cultural institution in the State of Massachusetts, and in which political passions are central.

2. In *Michigan v. Long*, the State court had clearly decided the constitutional issue presented. Here, on the other hand, as the *en banc* majority expressly acknowledged (A 27a), the State court language upon which the *en banc* majority relied below was mere dicta. The *en banc* majority nevertheless decided that it was proper to rely upon that language as dispositive because the *en banc* majority said it was confident that the State court would hold that there was a constitutional defense if that issue had squarely been put to the State court. (A 27a).[17]

The tentative language in the State court's answers cannot possibly bear that weight. But regardless of precisely what weight the MSJC intended its tentative language to have, surely constitutional law should not be fashioned by state court dicta that contain no plain statement of any independent state ground. To do so is to base our most precious freedoms on little more than sand—which is precisely the nature of the decision below.

3. The decision below threatens federal rights. The MCRA in this case represents a remedy for interference with Redgrave's exercise of her First Amendment rights. The decision below barred access to that remedy. Therefore, the criticism that Justice Stevens has leveled at the *Michigan v. Long* presumption has no application here. *See Long*, 463 U.S. at 1068-69 (dissenting opinion).

B. Deciding a Federal Case by Relying on a State Court Dissent

Because neither the plurality MSJC opinion nor the concurring MSJC opinion contained any independent state ground,

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17 The *en banc* majority sought to bolster its position by referring to the need for a state court to be able to reshape a certified question. (A 28a). But the MSJC never reshaped the questions certified, never asked for argument on any reshaped questions and never answered any reshaped questions. Rather, the MSJC answered only the questions that were certified and expressly stated that it was *not* going beyond the confines of the certified questions. *See*, A 49a, quoted above at page 11, note 8.

the Court of Appeals could not properly defer to what was said in those opinions about constitutional law. And because those two opinions represented the views of five of the seven MSJC justices, and those two opinions said nothing at all helpful to BSO on any statutory issue, the case could not possibly be decided in BSO's favor on state law grounds consistent with *Michigan v. Long*.[18]

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18 The *en banc* majority went so far as to speculate that the five MSJC plurality and concurring justices would have agreed with the two dissenters and would have disposed of the case on state statutory grounds if the right question of statutory construction had been certified to the MSJC. (A 38a). The *en banc* majority engaged in this unsupportable speculation even though the plurality and the concurring MSJC opinions resolved all statutory issues in Redgrave's favor, and even though the MSJC dissent was just that—a dissent. This unacceptable speculation by the *en banc* majority was based on a snippet at the end of the MSJC dissenting opinion, where the dissenters had identified an additional possible statutory defense for BSO that was not encompassed by the certified questions, and that had never been argued by the BSO, namely, that "merely" cancelling the performance did not constitute a "threat, intimidation or coercion" within the meaning of the MCRA. (A 126a). The *en banc* dissent spoke persuasively about the *en banc* majority's misuse of this language in the MSJC dissent (A 51a-52a; emphasis in original):

> Importantly, this argument was not articulated by any party to this case nor was it addressed in any fashion by either the plurality or the concurring justices of the SJC. It was simply a suggested theory, virtually an aside, presented in the last paragraph of the dissent. At that, the dissenting justices noted only that it was "doubtful" that the BSO's action amounted to "interference with secured rights by threats, intimidation or coercion." 399 Mass. at 110, 502 N.E.2d at 1385 (O'Connor, J., dissenting).
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> Nevertheless, the majority speculates that there "would" be "unanimity" [on the MSJC] on this theory. *Supra* at 54. The majority identifies no precedent of the SJC that supports such speculation. It merely points out that the SJC, like all courts, normally construes statutes so as to avoid constitutional difficulties and also notes that "none of the other justices rejected" the dissent's "novel" statutory argument. *Id.* I think it obvious that this important issue of statutory construction cannot stand on such a flimsy foundation. To begin with, I can ascribe no significance to the fact that the plurality and concurring justices failed to reject this argument given that no party ever raised the issue and it was not even the basis for the dissent. More fundamentally, I think

Nevertheless, the *en banc* majority attempted to buttress its decision—that the MSJC had decided the case on State law grounds—by relying upon what the MSJC's two dissenting justices had to say about the meaning of the statute. The *en banc* majority's reasoning was simple:

> There are at least four votes on the SJC for denying liability on state law grounds. The concurring [two] justices would establish a state constitutional defense, and the [two] dissenters would interpret the statute, in light of constitutional concerns, to prohibit liability in the first instance . . . [I]t is [therefore] unnecessary and improper for us to reach the federal constitutional issues. (A 38a).

Wholly aside from the concurring opinion's failure to state an independent state ground (which therefore means the concurrence may *not* be relied upon in this manner), the *en banc* majority's reasoning is profoundly flawed. It ignores the proper role of the federal courts, and it confuses this case, properly brought in federal court, with a case brought and decided solely in state court. The *en banc* dissent spoke persuasively to this point (A 48a):

> The central state law issues in this case are the two questions of statutory interpretation we certified to the SJC. On those questions, we have received clear answers from a majority of five justices. That two justices disagreed with the majority's analysis should have no bearing on our handling of this case, for their view, however interesting it may be, failed to carry the day in the SJC. Certainly we

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that the majority's facile interpretation of the statute is absolutely untenable as applied to the facts of this case. The BSO did not "merely" cancel a performance, it cancelled an employment contract with Redgrave—essentially fired her—on the basis of community reaction to her political beliefs. In so doing, the BSO substantially undermined Redgrave's ability to obtain other work, as evidenced by the fact that this court has affirmed an award to Redgrave of $12,000 in consequential contract damages . . . . Even if they do not amount to "threats" or "intimidation," I fail to see how the BSO's actions, affecting Redgrave's fundamental right to work, can be characterized as other than "coercive" within the meaning of the MCRA.

have no business combining the two dissenting votes with the votes of the two concurring justices, who based their position on entirely different grounds and indeed explicitly rejected the dissent's analysis. In its eagerness to "defer" to the SJC, the majority of this court has confused the procedure of certifying questions of state law to a state court with the procedure of certifying entire cases to state courts. Federal courts do not certify cases to state courts. They certify questions of law and then apply the answers to those questions to reach a result which represents the combined effect of majority, not minority, positions.

General application of the majority's head-counting approach would produce equally inconsistent and anomalous results in other cases. In deciding cases involving multiple issues of Massachusetts law, federal courts in this circuit would be free to comb the volumes of Massachusetts Reports until they found sufficient dissenting votes from different justices on some combination of issues to produce a "majority." Hypothesizing that the case actually arose in state court, the federal court could then apply its constructed "majority" of dissents even though its resulting decision ran counter to the result that would be produced if the court applied the majority position on each issue. Such a situation obviously would be intolerable.

C. Abdicating the Critical Judicial Function of Applying Law to Fact

The mangling of the certification procedure that occurred below violated Redgrave's most basic due process right—the right to have a court apply the applicable law to the facts before judgment is entered against her.

One searches in vain through the *en banc* majority opinion below for any attempt to apply the law, as supposedly given in the MSJC's dicta, to the trial record in this case. Instead, the Court of Appeals simply deferred to the MSJC's dicta, as if that dicta had decided the case.

The MSJC, meanwhile, made no attempt to apply law to fact—no doubt because it was not the function of the MSJC to decide this case, or to apply the law to the facts, but only to answer the questions that had been certified by the federal court.

The Court of Appeals therefore entered judgment against Redgrave on her MCRA claim without any court having applied law to fact. This further misuse of the certification process deprived Redgrave of her fundamental right of due process of law.

* * *

Certification was not merely misused here. It was turned on its head. The principles of comity and federalism that certification was designed to serve instead were grossly violated by its misuse. On this point, too, the *en banc* dissent was eloquent (A57a-58a; emphasis in original):

> The ultimate irony in this manipulative reading of the SJC's opinion lies in its purported justification: faithfulness to 'principles of comity and federalism.' *Supra* at 40. Certainly, the process whereby federal courts certify doubtful questions of state law to state courts can 'save time, energy, resources and hel[p] build a cooperative judicial federalism.'' *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). And where, as here, a state court delivers a definite answer to a question of state law which has been put to it, in the interest of comity that answer is normally conclusive in federal court. Even a *definite* answer to a question of state law *not* explicitly certified is welcome and entitled to considerable deference. But such principles simply are not involved in the extraordinary action taken by this court today. Not only does the majority of this court ignore the direct answers supplied by the SJC to the questions we certified, it finds controlling a question of law that was never even reached by a majority of the SJC . . . .
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> [T]he majority . . . enter[s] into a guessing game about what the SJC 'would' have done if we *had* certified [certain] questions [that were not certified]. The majority opinion is riddled with terms of speculation, actually using

> the word 'would' more than twenty times to describe what the SJC 'would' decide *if* all the state law issues had been put squarely before it.
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> The majority's opinion amounts to nothing more than a prediction, a 'hunch,' based on comments, or at best dicta, contained in the SJC's opinions, that the SJC 'would' decide the question of constitutional law raised by this case in favor of the BSO and that the state constitutional ruling 'would' be independent from the federal Constitution. This approach turns comity on its head, and makes a mockery of the certification process.
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> Far from deferring to state court prerogative, the majority's action places a federal court in the position of itself deciding a delicate and unresolved question of state law. In so doing, the court disregards the words of the SJC's answers to the certified questions by reading into those answers a view the SJC expressly declined to adopt. And, to make matters worse, the Court has resolved the state law issues in a manner that actually constitutes a *break* with existing state court precedent. Today, the United States Court of Appeals for the First Circuit effectively makes itself the first court ever to hold, as a matter of state law, that free speech rights under the Massachusetts Constitution are *not* based on federal court interpretations of the first amendment.

In *City of Houston* v. *Hill*, 107 S. Ct. 2502, 2515, n.23 (1987), this Court commented:

> [I]t would . . . be inappropriate for a federal court to certify the entire constitutional challenge to the state court, of course, for certified questions should be confined to uncertain questions of state law.

While the Court of Appeals in the case at bar did not literally certify a constitutional challenge to the State court, the Court of Appeals might as well have done just that: By refusing to decide the constitutional challenge to MCRA liability, and otherwise abdicating its judicial responsibilities, the Court of

Appeals permitted the certification device to violate rights and processes basic to our constitutional fabric. *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821) (Marshall, C.J.) ("With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution"); *Colorado River Water Conservation Dist.* v. *U.S.*, 424 U.S. 800, 818 (1976) (referring to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"); *Meredith* v. *Winter Haven*, 320 U.S. 228, 234 (1943) ("The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts").

This Court should take this case to ensure that the certification process is administered consistent both with litigants' rights and with the principles of "Our Federalism."

II

THE "HOLDING" BELOW, THAT THERE IS AN "ARTISTIC INTEGRITY" CONSTITUTIONAL DEFENSE TO MCRA LIABILITY, DESERVES REVIEW

The decision below holds—without an independent state ground—that a very significant new piece of civil rights legislation is unconstitutional, at least as applied.

The most glaring thing about the decision below is the complete absence of constitutional analysis that went into it.

The Court of Appeals *en banc* majority did not analyze the constitutional law issue. To be sure, the *en banc* majority devoted several pages (A 28a-34a) to an academic discussion of possible constitutional considerations, but that discussion ended as follows (A 33a; emphasis added): "We raise these points *not* to resolve the constitutional questions . . . ."

The MSJC's answers, meanwhile, commented cryptically on the constitutional issue. The MSJC's comments contained no analysis of the nature of BSO's supposed free speech right; no

discussion at all of the important State interest that the MCRA obviously embodies; no analysis of whether the MCRA might constitute permissible regulation; no discussion of whether that statute is content-neutral as regards anyone's speech; and no attempt to apply the tests that have been fashioned by this Court to weigh the constitutionality of such legislation as against a First Amendment challenge. All this is absent because the MSJC was not deciding any issue of constitutional law but only raising issues for subsequent consideration by the Court of Appeals.

The decision below is clearly contrary to this Court's prior rulings, which compel a careful balancing of interests before any statute is overturned as violative of the First Amendment. The court below did not merely apply the wrong test of constitutionality, it applied no test at all.

We have much to say on this subject, but for now we are constrained and must confine ourselves to directing the Court's attention to the *en banc* dissenters' analysis of the issue (A 58a-67a), and the following few additional thoughts:

1. By entering into contracts with Redgrave, and many others, BSO exercised its right to perform "Oedipus Rex" and relinquished the concomitant right not to be legally penalized for doing so. Under common law, contract damages are the appropriate remedy, or penalty, for BSO's changing its mind once it had exercised its rights by planning the "Oedipus Rex" program and engaging artists to perform it. Civil rights statutes, including but not limited to the MCRA, supplement the common law.[19]

The First Amendment no more gave BSO the right to change its mind about performing without incurring liability on a civil rights claim than it would on a contract claim—including but

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19 The MCRA resembles many federal and state laws prohibiting discrimination in employment, education, public accommodations, and housing, in that it imposes certain constitutionally-based norms on private conduct. *E.g.*, Titles II, VI, and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000d, 2000e *et seq.*; Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* Many entities covered by these antidiscrimination laws engage in First Amendment activity, including newspapers, publishers, theaters, ballets, topless dancing establishments, private schools and universities, utility companies and banks.

not limited to any claim by BSO ticketholders for return of the price of their tickets. BSO is liable, to those ticketholders for the price of admission, and to others on other grounds, regardless of whether or not BSO decided not to perform out of concern that its performance somehow might not be up to artistic par.

BSO's claim that it cancelled for reasons of "artistic integrity," because of hypothetical audience disruption, certainly does not rise to the level of a constitutional right that immunizes BSO from civil rights liability.[20] At best for BSO, BSO's concern for "artistic integrity" is, rather, merely one of those concerns that, the MSJC held in answering the second certified question (A 25a; 116a-117a), is subservient to the overriding State interest in providing a remedy for interference with basic rights, and that the Massachusetts Legislature did not intend to be a defense to MCRA liability.

2. Even if it could be said that BSO had some constitutionally protected interest that could be affected by MCRA liability here, that would not defeat Redgrave's MCRA claim. The speech content-neutral requirement that BSO abide by the MCRA is no more violative of BSO's constitutional rights than the speech content-neutral law that requires BSO to have visible exit signs, and lights, at various points in its establishment: Both serve compelling state interests, and, if they intrude at all upon BSO's expression, they do so minimally, and consistent with constitutional standards. *See, e.g., Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940, at 1947 (1987); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, at 650-53 (1985); *Roberts v. United States Jaycees*, 468 U.S. 609, at 624-28 (1984); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, at 222 (1977).

This substantive issue is worthy of grant of certiorari. The decision below holds unconstitutional an important new civil rights statute, deprives Redgrave and others of a remedy for

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20 Indeed, as the *en banc* dissent pointed out, BSO's argument for "artistic integrity" in fact "is the opposite of 'artistic integrity'; it [would] allow the audience to dictate who shall perform, and what shall be played. 'Artistic integrity' under this view would be a license for the heckler's veto in the arena of artistic expression." (A 66a).

interference with the exercise of constitutional rights, and threatens the enforcement of other hitherto settled rules of law. That profound result was accomplished by an unprecedented extension of the constitutional law of free speech, without any constitutional analysis, and on the basis of mere dicta.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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